83-965

No. 83-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH B. CLOWARD, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a Federal court obtain *in rem* jurisdiction when the seizure upon which such jurisdiction is based violated the Fourth Amendment to the Federal Constitution?

2. Do the procedural provisions of the Federal Food, Drug, and Cosmetic Act for condemnation cases and Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims as applied in such condemnation cases violate the Fifth Amendment's requirement for procedural Due Process?

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

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No. __

RALPH B. CLOWARD, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Ralph B. Cloward respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 12, 1983.

OPINIONS BELOW

The decision of the Court of Appeals is reported as United States of America vs. An

Article of Device . . . "Theramatic", 715 F.2d 1339 (9th Cir. 1983). A copy of the opinion affirming the District Court for the District of Hawaii appears in the Appendix hereto.

The Order Adopting Magistrate's Report and Recommendation entered by the District Court for the District of Hawaii and the Magistrate's Report and Recommendation appears in the Appendix.

An earlier opinion by the Court of Appeals in this case is reported as United States v. Device Labeled "Theramatic", 641 F.2d 1289 (9th Cir. 1981). A copy of that opinion also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 12, 1983. No motion for a rehearing was made, and this petition for certiorari was filed within 90 days of that date. The Supreme Court has

jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

U.S. Const., amendment V: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 304(a)(1) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 334(a)(1), is set forth in the Appendix.

Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims is set forth in the Appendix.

EXISTENCE OF JURISDICTION BELOW

This case was commenced by the Government to have certain property condemned because it was "misbranded" under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301-92 (the

"Act"). Section 304(a)(1) of the Act, 21 U.S.C. §334(a)(1) provides that "misbranded" articles shipped in interstate commerce may be condemned in any district court within the jurisdiction of which the property is found. Federal court jurisdiction is also provided by 28 U.S.C. §1345, which provides jurisdiction for all civil proceedings commenced by the United States.

STATEMENT OF CASE

In 1972, the Food and Drug Administration ("FDA") had been investigating "diathermy"[1] devices manufactured by Dynapower Systems Corporation. On October 6, 1972, Petitioner, a Honolulu nuerosurgeon, identified and furnished to an FDA inspector certain literature and correspondence concerning a device called

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1. Webster's New Collegiate Dictionary defines "diathermy" as the "generation of heat in tissue by electric currents for medical or surgical purposes."

a "Theramatic Mark VII", which Petitioner acknowledged had been in his poseession for six years, since 1966.

On October 24, 1972, Petitioner gave the FDA inspector a requested affidavit on an FDA form reciting the above and referring to a "Theramatic device currently at Queen's Medical Center" which had been donated to Queen's in 1966 and to "The Theramatic device in our office".

Three months later, on January 16, 1973, the United States Attorney for the District of Hawaii filed a Complaint for Forfeiture. The Complaint was directed against some of the literature which Petitioner had identified and the "Theramatic Mark VII" which Petitioner had acknowledged as being in his office.

The Complaint alleged (1) that statements in the literature misrepresented that the Mark VII is adequate and effective as a treatment

for identified ailments; (2) that the literature failed to bear adequate directions for treatment of identified ailments; and (3) that, "when used in the dosage and with the frequency and duration prescribed, recommended and suggested in the [literature]", the Mark VII is dangerous to health. As stated by the Court of Appeals, "In effect, the complaint says merely: 'This machine doesn't work'." 641 F.2d at 1293.

As stated by the Court of Appeals, "Absolutely no supporting evidence is given for these allegations." 641 F.2d at 1293.

The Complaint did not allege that the Mark VII was in fact being used in the manner alleged to be inadequate or ineffective and it did not allege that there was any actual danger or harm involved.

There has never been an allegation or showing that the property in question would

or could have been removed from the geographical limits of the District Court's jurisdiction. Nor has there ever been an allegation that Petitioner would not have obeyed and responded to a temporary restraining order enjoining him from removing or using the property until there could be a hearing on whether the Government was entitled to have the property condemned.

At the time the Complaint was filed, an Affidavit of Robert Fukuda, United States Attorney, (the "Affidavit") was filed. The Affidavit does not state that the United States Attorney had any personal knowledge of the factual matters alleged in the Complaint nor did it state the source or the limits of his knowledge with respect thereto. There is also nothing in the Affidavit which sets forth the qualifications of the United States Attorney to testify or verify the conclusionary

allegations made in the Complaint. The Affidavit stated in total:

> "The he [the affiant] is the United States Attorney for the District of Hawaii; that he has read the foregoing Complaint for Forfeiture and knows the contents thereof which are true to the best of his knowledge."

The Government conceded in the District Court that "Mr. Fukuda would not have gone out and made an independent investigation of the Theramatic device to determine from consulting with his own independent experts and authorities that the device was misbranded as alleged."

Based solely on the filing of the Complaint and the Affidavit, the Clerk of the District Court issued a "Warrant of Arrest" commanding the U.S. Marshal to summarily and immediately seize and detain the property. Neither the Complaint nor the Affidavit were shown to any judge, magistrate, or similar judicial officer prior to the issuance of the Warrant of Arrest.

The U.S. Marshal, acting as the Court's officer, executed the Warrant by going to Petitioner's private medical office and seizing the literature on January 16 and the Mark VII on January 18, 1973.

On February 16, 1973, Petitioner filed a Motion to Set Aside Warrant of Arrest and for Other Relief which challenged the issuance of the Warrant. The Motion was originally scheduled by the District Court to be heard on March 26, 1973, more than two months after the seizures.

On March 23, a representative of the FDA informed Petitioner that the Government had seized the wrong machine. The Government had intended to seize a "Standard" Model Theramatic device, Model A-6DT40 which had been the object of the Government's investigations. In the course of the explanation, the Petitioner was given a letter dated March 9, 1973, to the

United States Attorney that stated in pertinent part:

> "The device seized in this action is the Theramatic Mark VII. The "banned" device referred to by Mr. Sattler is the Standard Model Theramatic device, Model A-6DT40. . . .
>
> ". . . multiple seizure actions were instituted against the Standard Model on the basis that the device was misbranded. The [manufacturing] firm . . . offered owners an allowance for . . . trading it in on the firm's newer model, the Theramatic Mark VII, the device involved in this action.
>
> "In 1968 . . . the manufacturer . . . submitted data to the FDA which indicated that the Mark VII device is capable of producing heat in the range of medically useful diathermy. The firm also submitted to the FDA labeling which, after several revisions, was determined to be satisfactory."

The Government also informed Petitioner that the matter could be speedily resolved by entering into a Consent Decree which called for Petitioner to disconnect the lower settings

on the Mark VII.[2] Later, however, the Government reneged on its obligations under the Consent Decree because of "a recent court decision and evolving policy of the agency . . . ."

After proceedings in the District Court not relevant to this petition, the Court of Appeals determined in the first appeal in this case, that "the procedure used in seizing [Petitioner's] diathermy device and the accompanying leaflets violated the Fourth Amendment" and reversed the District Court's judgment and remanded the case for further proceedings.

Upon remand, the District Court determined that the constitutional "exclusionary rule" enunciated in Weeks v. United States 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S.

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2. Petitioner's efforts to have the lower settings disconnected were thwarted by the refusal of the Government to permit Petitioner's technician have access to the "arrested" device.

643 (1961), applied in this case but that a claimant may not object to a "forfeiture" where the requirements of a forfeiture have been proven by evidence not "tainted" by an illegal seizure. Although Petitioner argued that the Court could not obtain jurisdiction through an unconstitutional seizure and that the procedural provisions of the Act and Rule C violated the Fifth Amendment, the District Court rejected Petitioner's arguments and entered an unopposed summary judgment condemning the property after all appeals had been exhausted.

In the second appeal in this case, the Court of Appeals upheld the District Court's ruling concerning the Fourth Amendment and further ruled that Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), governed Petitioner's Fifth Amendment claims and held that due process was satisfied because "a lawsuit is pending in the district court

at the time of the seizure" and a claimant may obtain a "trial on the merits, including a jury trial if he requests it."

REASONS FOR GRANTING THE WRIT

1. This Court has not considered whether the constitutional exclusionary rule applies in a condemnation case under the Federal Food, Drug, and Cosmetic Act and this Court has not considered what effect is to be given to a seizure made in violation of the Fourth Amendment which was made solely to obtain in rem jurisdiction under the Act.

The decision in the first appeal was a landmark decision by the Court of Appeals. It was the first appellate decision which ruled that using a Warrant of Arrest as the means for initiating a condemnation action under the Act is unlawful where the Warrant is issued without compliance with the basic requirements of the Fourth Amendment. There is a split in

the Courts of Appeal on this point. Compare, U.S. v. Device Labeled "Theramatic", 641 F.2d 1289 (9th Cir. 1981), with U.S. v. Articles of Hazardous Substance . . ., 588 F.2d 89 (4th Cir. 1978).

In the second appeal from which this petition is made, the Court of Appeals essentially ruled that the exclusionary rule applied to this case and that the illegality of the seizure had no effect on the District Court's jurisdiction.

This case presents a question of first impression concerning what is to be done in an FDA condemnation proceeding which had been commenced by an unconstitutional seizure made pursuant to 21 U.S.C. §334 and Rule C of the Supplemental Rules for Admiralty and Maritime Claims.

The only cases which are analogous are cases in which property was originally seized

illegally by police investigators whose purpose in seizing such property was to obtain evidence for use in a criminal proceeding and in which subsequent "forfeiture" proceedings were instituted as an incidental penalty for engaging in criminal conduct. In those cases, the Court has decided that deterrence of the unlawful activity, i.e., illegally obtaining evidence, required that the exclusionary rule apply. See, e.g., One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

It must be emphasized that in this case, Petitioner's property was seized solely to initiate and prosecute the condemnation proceeding. The Government was not seeking evidence. No crime was involved, and no "forfeiture" had occurred by reason of any criminal activity.

Mere application of the exclusionary rule in cases like this one has no deterrent effect.

Under the ruling of the Court of Appeals, the Government is free to ignore the Fourth Amendment when seizing property for the purpose of commencing proceedings under the Act. The Government has no reason to be concerned that the proceeding would be dismissed. Since the seizure is not made for the purpose of obtaining evidence, the Government would not be concerned that the exclusionary rule might make the seized property inadmissible as evidence. Under the Court of Appeals' ruling, admissibility of the seized property has no real effect on the proceedings.

This Court should consider whether the only way to deter the Government from violating the Fourth Amendment in cases like this one is to hold that the Government may not obtain what it seeks, i.e., in rem jurisdiction, by a seizure which violates the Constitution. In other situations, the Court has fashioned a

remedy to deter the unlawful conduct. For example, the reason for adopting the exclusionary rule was simply to deter unlawful government conduct. Elkins v. United States, 364 U.S. 206 (1960).

> "'The rule is calculated to prevent, not to repair. Its purpose is to deter -- compel respect for the constitutional gauranty in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

2. This Court should examine the constitutionality of the procedural provisions of the Federal Food, Drug, and Cosmetic Act under the Fifth Amendment and consider whether Ewing v. Mytinger & Castelberry, Inc., relied upon by the Court of Appeals, controls this case, and if so, the extent to which that case has continued vitality.

In upholding the constitutionality of the Act and Rule C, the Court of Appeals held that the thirty-three year old holding in Ewing v.

Mytinger & Casslebery, Inc., 339 U.S. 594 (1950) "governed" Petitioner's claim. Petitioner submits that Ewing does not govern the claim in this case. Furthermore, Petitioner submits that this Court should re-examine the consitutionality of the Act and Rule C in light of the several recent decisions by this Court and other courts concerning what protections due process requires before property can be seized without any prior notice or hearing in the context of the Act and Rule C.

The Ewing case was not concerned with a seizure and did not address the Rules of Admiralty. That case involved the "multiple seizure" portion of Section 304(a) of the Act, 21 U.S.C. §334(a). The "multiple seizure" portion of the Act prohibits more than one pending action based upon the same alleged "misbranding" unless:

> ". . . the Administrator has probable cause to believe from facts found, without hearing, . . . that the misbranded article is dangerous to health, or that the labeling of the the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer." 21 U.S.C. §334(a).[3]

At issue in Ewing was a distributor's right to participate in the Government's preliminary determinations about whether to institute suit. Ewing did not consider the procedures required for an actual seizure of property after suit was filed. In the context of Ewing, the Court said:

> "[I]t has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the Government is justified in instituting suit in the courts." 339 U.S. at 599 (emphasis added).

In Ewing, an exclusive national distributor of an allegedly misbranded drug had filed

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3. The quoted portion of Section 304(a) of the Act has been amended to subsitute the "Secretary" for the "Administrator".

a separate suit to have the "multiple seizure" portion of the Act declared unconsitutional and to enjoin all but the first of eleven pending actions involving the same allegedly misbranded drug. The FDA Adminstrator had made an administrative finding that the labeling was, in the words of the statute, "misleading to the injury and damage of the purchaser or consumer". The issue was only whether the administrative finding could constitutionally be made without any opportunity to be heard. The Court said:

> "The administrative finding of probable cause required by § 304(a) is merely the statutory prerequisite to the bringing of the lawsuit. . . .
>
> ". . . Here an administrative agency is merely determining whether a judicial procedure should be instituted. Moreover, its finding of probable cause, while a necessary prerequisite to multiple seizures, has no effect in and of itself. . . . [T]he seizures and suits are dependent on the discretion of the Attorney General." 339 U.S. at 598-599 (emphasis added).

In other words, just like the recording of a mechanic's lien[4] or a notice of lis pendens[5], there is no "taking" or "seizure" at the preliminary stage where an agency is merely determining whether to institute a judicial proceeding. The Court stated in Ewing:

> "The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing. We cannot say that due process requires one at that stage.
>
> "The determination of probable cause in and of itself had no binding legal consequence . . . Judicial review of such a preliminary step in a judicial proceeding is so unique that we are not willing to easily infer that it exists.

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4. See, Spielman-Fond, Inc. v. Hanson's, Inc., 379 F.Supp. 997 (D.Ariz. 1973)(3-judge court), aff'd mem., 417 U.S. 901 (1974); Connolly Development Inc. v. Superior Court, 132 Cal. Rptr. 477, 533 P.2d 637 (1976), appeal dismissed for want of a substantial federal question, 429 U.S. 1056 (1977).

5. See, Batey v. Digirolamo, 418 F.Supp. 695 (D. Hawaii 1976); Empfield v. Superior Court, 33 Cal. App. 3d 105, 108 Cal. Rptr. 375 (2d Dist. 1973).

> "Judicial review of this preliminary phase of the administrative procedure does not fit the statutory scheme nor serve the policy of the Act." 339 U.S. at 600 (emphasis added).

In Ewing, the Court did not consider what procedures the due process clause requires at a later stage under the Act, i.e., at the time of an actual seizure commencing a condemnation action.

Even if Ewing had been concerned with the procedures used to seize property to commence suit, this Court has long since clarified the dicta stated in Ewing that "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination." 339 U.S. at 599.

The fact that Mrs. Sniadach could later litigate her dispute over a refrigerator did not satisfy due process in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). The fact

that Mrs. Fuentes had a right to a later trial did not satisfy due process in Fuentes v. Shevin, 407 U.S. 67 (1972). Based on Sniadach and Fuentes, and their progeny, where "only property rights" were concerned, several courts have questioned the constitutionality of the provisions in the Supplemental Rules for proceedings in rem. See, e.g., Techem Chemical Co., Ltd. v. M/T Choyo Maru, 416 F.Supp. 960 (D.Md. 1976); Amstar Corporation v. M/V Alexandros T., 431 F.Supp. 328 (D.Md. 1977); United States v. Articles of Hazardous Substance, 444 F.Supp. 1260 (M.D.N.C. 1978), reversed, 588 F.2d 39 (4th Cir. 1978).

Although Ewing has been cited by this Court in several cases dealing with due process questions, the Act and Rule C have not been examined by the Court. The constitutionality of the Act and Rule C has not been decided by the Court.

This case is distinguishable from cases relied upon by the Court of Appeals. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), a statute prohibited the issuance of a writ of sequestration unless more than conclusory allegations were first reviewed by a disinterested judge and where the defendant was protected by a bond requirement and an express provision for an immediate hearing and dissolution of the writ unless the plaintiff proved the grounds upon which the writ was issued. This case is distinguishable from Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), where the property subject to seizure was a mobile yacht temporarily anchored at harbor. This case is different from Parrat v. Taylor, 451 U.S. 527 (1980), involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state prison employee. This case is also different from

Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981), where the statute and regulations before the Court were narrowly drawn and the subject of the regulation was "a condition or practice which could '[r]easonably be expected to cause substantial physical harm to persons'" and the regulation was confined to situations where there was "A reasonable expectation of death or serious injury". Furthermore, the mine operators in Hodel were afforded prompt and adequate post-deprivation hearings within a 5-day statutory maximum period.

The procedural protections found in the above cases are absent in this case. First, the property did not belong to the Government at any stage; the fact that it may have been "misbranded", a term which could apply to any

property,[6] only means that it may eventually be ordered destroyed by court order. In this respect it is not "forfeited" and does not automatically become the property of the Government, as in forfeiture proceedings like Calero-Toledo, and other cases where the use of property in the commission of a crime constitutes a statutory transfer of the property to the Government at the time the offense is committed.

Second, the Government's complaint under the Act is conclusory in nature and is not supported by any evidence which could show probable cause for the Government's claim.

Third, the procedures in the Act and Rule C do not provide for any review by a neutral judge and they authorize the issuance of a

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6. For example, a device is "misbranded" if its labeling is false or misleading in any particular. See, 21 U.S.C. §352(a).

Warrant of Arrest as a nondiscretionary act by the clerk of a district court.

Fourth, no security is required to protect the person whose property is seized by mistake. The Government does not concede any liability for mistakes and if such liability exists at all, it may be subject to such defenses and expense as to render it meaningless as a protection.

Fifth, neither the Act nor the Rules require or provide for any immediate post-seizure hearing. The Government is free to seize the property and do nothing should it so choose.

Sixth, the Government has no burden of proof at any pretrial hearing and has no burden of moving the case to trial. The burden of putting the Government to its proof is placed entirely upon the owner of the property. Indeed, the owner is not even required to be

named in the suit but is put to the burden of coming forward and "claiming" the property.

Seventh, there is no requirement limiting the Government's power to seize to special situations demanding prompt action or involving immediate danger that the property would be destroyed or concealed. Indeed, the Government admits that it knew that the property seized in this case was in Petitioner's possession for months before it decided to file a Complaint. There is no showing that any additional delay occasioned by giving prior notice and hearing would result in any harm, real or imagined. As shown by this case, the statute can cover all situations, whether actual harm is involved or not.

Eighth, there is no necessity for physically seizing and keeping the property to maintain the jurisdiction of the court. In U.S. v. Olsen, 161 F.2d 669 (9th Cir. 1947), for

example, the property was returned to the owner and thereafter the case proceeded through trial and appeal.

CONCLUSION

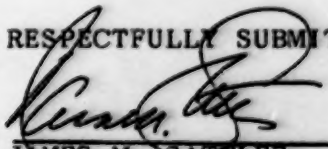
For the above reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals. The Fourth and Fifth Amendments were specifically designed as procedural protections from the federal Government. "The history of liberty has largely been the history of observance of procedural safeguards." McNabbe v. U.S., 318 U.S. 332, 347 (1943).

This case demonstrates the breadth of the authority given to the Government under the Act and the Rules: without any notice the Government seized property from a private office without having to satisfy any neutral person that there was any support for its claim and without any unusual circumstances which justified such drastic action. This authority

should not exist under the Constitution. If the seizure in this case is upheld, no person should consider his property free from seizure without warning. The Government need merely say that the property is misleading in any particular. There is no procedural safeguard to protect against mistakes or abuse of the authority.

DATED: Honolulu, Hawaii, December 8, 1983.

RESPECTFULLY SUBMITTED,



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APPENDIX A

United States Court of Appeals,
Ninth Circuit

No. 78-2998
D.C. No. 73-3733

United States of America,
Plaintiff-Appellee,

v.

An Article of Device Consisting of One Device, More or Less, Labeled in Part:

(Front)

"Theramatic",
Defendant,

and

Dr. Ralph B. Cloward,
Claimant-Appellant.

Appeal from the United States District Court for the District of Hawaii, Dick Yin Wong, District Judge, Presiding.

Before SKOPIL, FLETCHER, and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

On January 16, 1973, the United States Attorney for the District of Hawaii obtained a warrant of arrest in rem, directing the United States Marshal to seize a diathermy machine and accompanying leaflets belonging to appellant, Dr. Ralph B. Cloward, a Honolulu neurosurgeon. The propriety of the procedure used to obtain that warrant is the subject of this appeal. We agree with appellant's contention that, in the circumstances of this case, the challenged procedure violated the Fourth Amendment.

The authority for the seizure of appellant's diathermy machine stemmed from the Food, Drug, and Cosmetic Act, 21 U.S.C. § § 301-92. At the time the warrant directing the seizure was obtained, section 304(a)(1) of that act, 21 U.S.C. § 334(a)(1), provided for seizure of any "adulterated or misbranded" medical device shipped in

interstate commerce.[1] Section 304(b) stipulates that, except for the availability of jury trials, the procedure for seizures under the act "shall conform, as nearly as may be, to the procedure in admiralty," 21 U.S.C. § 334(b). Accordingly, the procedure used to seize appellant's machine was that laid down by Rule C of the Supplemental Rules for Certain Admiralty and Maritime

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1. The Medical Device Amendments of 1976, Pub. L. 94-295 § 3(c), 90 Stat. 539 (1976), amended section 304 of the Food, Drug, and Cosmetic Act to permit the seizure of adulterated or misbranded medical devices found in any state, regardless of whether they moved in interstate commerce. 21 U.S.C. § 334(a)(2) (1980 Supp.).

Claims.[2]

As Rule C(3) requires, the warrant for seizure was issued by the clerk of the

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2. Rule C provides, in relevant part:

(1) When available. An action in rem may be brought:

. . . .

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

. . . .

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Process. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the vessel or other property that is the subject of the action and deliver it to the marshal for service. . . .

United States District Court for the District of Hawaii upon the filing of a verified complaint for forfeiture. That complaint alleged that appellant's diathermy machine was "misbranded" within the meaning of 21 U.S.C. § 334(a) because it was medically ineffective and thus useless in treating the conditions that the leaflets claimed the machine could alleviate.[3] The clerk issued the warrant on the day the complaint was filed, and within two days the United

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(cont.)

Fed.R.Civ.P. Supp. Rule C.

3. A diathermy machine produces localized heating of subcutaneous body tissue by means of high-frequency electrical oscillations. The government's objections to the particular model owned by Dr. Cloward (as explained in the memorandum supporting the government's motion below for summary judgment) was that it failed to heat the tissue enough to be medically useful, and that diathermy is not an effective therapy for the conditions mentioned in the leaflets accompanying the device.

States Marshal seized the diathermy machine in appellant's medical office in Honolulu.

This procedure did not afford appellant any notice of the legal proceedings against his device before the actual seizure. Moreover, there was no judicial hearing before the seizure, nor was the Government's complaint examined by a judicial officer with discretion to refuse to issue the warrant. Citing these factors, appellant moved on February 16, 1973 to set aside the warrant of arrest and to compel the return of his machine, arguing that his Fifth Amendment due process rights had been violated.[4]

After lengthy intervening proceedings not relevant to this appeal--including an abortive attempt to negotiate a

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4. Appellant also argued that the affidavit verifying the government's complaint was legally insufficient.

settlement--the district court denied appellant's motion on March 29, 1977. The district court entered summary judgment for the Government on June 9, 1978, condemning appellant's device and ordering its destruction once all appeals had been exhausted. Appellant appeals from this judgment and from the order of March 29, 1977 denying his motion to set aside the arrest warrant and compel the return of the diathermy machine.

We agree with appellant's contention that, in the particular factual setting involved here, the procedure used in seizing his diathermy machine and the accompanying

leaflets violated the Fourth Amendment.[5]

The Fourth Amendment prohibits "unreasonable searches and seizures." The instant case involves not only a seizure (of appellant's diathermy machine) but a paradigmatic search--a physical intrusion by the U.S. Marshal into Dr. Cloward's office. Deciding whether a law-enforcement practice meets the Fourth Amendment's command of

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5. In view of this disposition, we do not reach appellant's due process argument, nor the claim that the verification of the complaint was defective.

Appellant did not raise his Fourth Amendment claim in the trial court, either in his initial motion to set aside the arrest warrant or in his later, supplemental motion, and the trial court never ruled on that claim. Ordinarily, this court would not consider an issue raised for the first time on appeal. United States v. Black, 609 F.2d 1330, 1333 (9th Cir. 1979). In this instance, however, the exception stated in Black applies--"the issue conceded or neglected in the trial court is purely one of law and the pertinent record has been fully developed . . . [and] the issues have been fully briefed." Id. Moreover, the government has raised no objection to consideration of the Fourth

reasonableness requires "balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests." Delaware v. Prouse, 440 U.S. 648, 654 (1979); accord, Bell v. Wolfish, 441 U.S. 520, 559 (1979). "In construing this command [of reasonableness], there has been general agreement that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'" Cady v. Dombrowski, 413 U.S. 433, 439 (1973), quoting Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

The rule that "searches conducted outside the judicial process, without prior

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(cont.)

Amendment issue.

approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions," Katz v. United States, 389 U.S. 347, 357 (1967), has from time to time been questioned by individual justices.[6] But where the search at issue takes place in a person's home or office--as happened here --the warrant requirement has been undisputed:

> Both sides to the controversy appear to recognize a distinction between searches and seizures that take place on a man's property--his home or office--and those carried out elsewhere. It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's

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6. See Payton v. New York, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting); Marshall v. Barlow's, Inc., 436 U.S. 307, 325-28 (1978) (Stevens, J., dissenting); Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring); Vale v. Louisiana, 399 U.S. 30, 36 (1970) (Black, J., dissenting).

> premises without a warrant is per se unreasonable, unless . . . it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances."

Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971) (footnote omitted).[7]

Equating an office with a home as a place where a warrantless search is prima facie unreasonable is no isolated instance. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978) (rule that "warrantless searches are generally unreasonable . . . applies to commercial premises as well as homes"). Indeed, in United States v. Chadwick, 433 U.S. 1 (1977), although the government advocated a very restricted view of the need for a search warrant, it nonetheless conceded that "offices" no less than "homes" do "implicate interests which lie

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7. This language was quoted approvingly last Term in Payton v. New York, 445 U.S. 573, 586 n.25 (1980).

at the core of the Fourth Amendment." Id. at 7.

In G. M. Leasing Corp. v. United States, 429 U.S. 338 (1977), the Supreme Court reaffirmed the position that entry into private property--specifically, a business office--requires a warrant. There, government agents, without a warrant, seized various items of property subject to levy under an income tax assessment. Some of the items seized were automobiles found on public streets and lots; other items were books and records taken from the corporation's business offices. The Court upheld the seizures of the automobiles but struck down the seizure of the records, saying:

> It is one thing to seize without a warrant property resting in an open area or seizable without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private

> premises to which access is not otherwise available for the seizing officer.

Id. at 354.

Thus, since the search involved in the instant case took place in Dr. Cloward's medical office, it falls under "the general constitutional requirement that for a search to be reasonable a warrant must be obtained." Marshall v. Barlow's, Inc., 436 U.S. 307, 324 (1978).[8] It is true that a warrant of sorts was obtained in this case --a warrant of arrest in rem. But the procedure used to obtain that warrant failed to satisfy constitutional requirements.

The Fourth Amendment explicitly commands that "no Warrants shall issue, but

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8. That requirement is not abrogated merely because the search and seizure here occurred in a non-criminal context. "[T]he Fourth Amendment . . . protects against warrantless intrusions during civil as well as criminal investigations." Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978).

upon probable cause." Case law has established the further requirement that the warrant must be issued by a "neutral and detached magistrate," who must actually determine whether probable cause for a search exists. Delaware v. Prouse, 440 U.S. 648, 654 n. 11 (1979); United States v. United States District Court, 407 U.S. 316 (1972). These requirements are not mere formalities. "[T]he very purpose of the warrant requirement . . . is to place a neutral magistrate between the public and police conduct." United States v. Allard, No. 79-1821, slip op. at 419 (9th Cir. Oct. 14, 1980); see also United States v. Chadwick, 433 U.S. 1, 9 (1977); United States v. United States District Court, 407 U.S. 297, 316 (1972). That is why the Supreme Court has insisted that the official who issues a warrant "must be capable of determining whether probable cause exists

for the requested arrest or search." Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972). The clerk who issued the warrant used in seizing appellant's diathermy machine did not meet this condition, for two reasons.

In the first place, the purely conclusory nature of the government's complaint for forfeiture meant that the clerk was not given any of the facts needed to decide whether there was probable cause to believe that appellant's diathermy machine violated the law. That complaint essentially made three allegations: (i) that statements in the leaflets accompanying the diathermy machine, representing it as effective in treating various specified ailments, "are false and misleading, since the article is not adequate and effective for such purposes"; (ii) that the machine "fails to bear adequate directions for use for . . .

the treatment of the above named conditions and diseases, since adequate directions cannot be written for use by laymen of the article for such purposes"; and (iii) that the machine "is dangerous to health . . . since it is ineffective for treatment of the serious conditions represented and suggested in its labeling." Absolutely no supporting evidence is given for any of these allegations. In effect, the complaint says merely: "This machine doesn't work." The official who received the complaint was thus given no basis whatsoever on which to decide independently whether probable cause for seizure existed.[9]

Second, that official--the court

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9. Indeed, the complaint says nothing about why the appellant's machine is medically ineffective. The allegation that it failed to heat body tissue sufficiently for therapeutic purposes appears only in the government's motion for summary judgment and the supporting affidavits.

clerk--was not empowered to make such an independent decision. Supplemental Rule C stipulates that the clerk of the district court is to receive and examine the complaint for forfeiture, and Rule C(3) appears to make the clerk's role purely ministerial: "Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest of the . . . property that is the subject of the action . . . ." The clerk apparently has no discretion to refuse to issue a warrant once the complaint has been filed. At most, the clerk may have the power to refuse a warrant where the complaint fails to meet the formal requirements of Rule C(2). 7A Moore's Federal Practice ¶ C.12, at 682. But this still leaves the clerk without discretion to examine the substantive adequacy of the complaint.

The warrant employed in the instant case was therefore obtained in a

constitutionally defective manner. The intrusion into Dr. Cloward's office, and the seizure of his diathermy machine, must therefore be held unlawful, unless one of the "specifically established and well-delineated exceptions" to the warrant requirement applies. Katz v. United States, 389 U.S. 347, 357 (1967).

A warrant is unnecessary when the search is conducted pursuant to consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Appellant, however, never consented to the instant search. The exception permitting warrantless search of the person and immediate surroundings of someone arrested, United States v. Robinson, 414 U.S. 218, 224 (1973), is inapplicable here because appellant was not arrested. Even more patently irrelevant are the exceptions for border searches, United States v. Ramsey, 431 U.S. 606, 616-19 (1977), and for

searches made during "hot pursuit" of a dangerous suspect, Warden v. Hayden, 387 U.S. 294, 298-99 (1967). We are not dealing here with a search of an automobile, where warrantless searches may be permitted because the vehicle could be driven away while a warrant was being obtained. Chambers v. Maroney, 399 U.S. 42, 50-51 (1970).[1]

Finally, it is hard to find any "exigent circumstances" in the present case that would excuse the failure to obtain a valid warrant. Such circumstances exist

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10. Neither are we dealing with the kind of situation with which the admiralty rules were designed to deal--the seizure of a ship, whose mobility, like that of the automobile, may necessitate expedited action without time to obtain a warrant. We therefore are not required to question "the prevailing law in admiralty cases . . . that a warrant to initiate an action in rem by attachment need not be accompanied by probable cause." United States v. Pappas, 613 F.2d 324, 328 (1st Cir. 1979) (questioning application of "prevailing law" in non-admiralty contexts).

where, for example, there is a high risk that evidence will be destroyed if law enforcement officers must wait to obtain a warrant. Cupp v. Murphy, 412 U.S. 291 (1973); Schmerber v. California, 384 U.S. 757, 770-71 (1966). Nothing in the record suggests that Dr. Cloward was likely to conceal his machine or to send it out of the jurisdiction. (The government could hardly worry that he might destroy the machine, since that was precisely what the government itself wanted). The government's own complaint, which asserted that appellant's diathermy machine "was shipped . . . on or about September 1, 1966," suggests that the device had been in appellant's possession for more than six years, making it hard to understand why there should suddenly be concern that it would disappear unless seized at once. There is also nothing in the record to

suggest a threat of imminent harm to anyone that would require swift action. We are not, for example, dealing with a case where it is necessary to seize dangerous drugs or contaminated food. Indeed, there is no allegation that appellant's machine had ever actually harmed anyone--the government's complaint alleged simply that the machine was not effective.

Thus, none of the traditional exceptions to the warrant requirements are applicable here. We are of course aware that recent Supreme Court decisions have permitted warrants for administrative searches to be issued on a basis weaker than the probable cause showing traditionally required for a criminal search warrant. See Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978). The traditional notion of probable cause, requiring reason to believe that the particular target of the

search is in violation of the law, would have prevented random inspections needed to enforce general statutory standards such as those governing housing conditions, Camara v. Municipal Court, 387 U.S. 523 (1967), or workplace safety, Marshall v. Barlow's, Inc., supra. Here, however, the government had a specific target in mind. It was not conducting random searches of physicians' offices to ensure general compliance with the Food, Drug, and Cosmetic Act, but rather searching a particular physician's office to seize a particular, identified device. No obstacle to that search is created by insisting that the government satisfy the traditional standard of probable cause to obtain a warrant.

There is even less reason to hold that the warrantless search of Dr. Cloward's office should be permitted on the authority of those Supreme Court opinions allowing

warrantless searches of businesses subject to pervasive and traditional regulation. United States v. Biswell, 406 U.S. 311 (1972)(firearms dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)(liquor dealer). The Court has emphasized that those cases "represent responses to relatively unique circumstances." Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978). Biswell and Colonnade involved statutes specifically authorizing searches of firearms and liquor dealers, whereas the search at issue here was not part of any statutory program to inspect physicians' offices--the same seizure procedure could have been used against misbranded devices no matter where they were found. We decline to extend the narrow Biswell-Colonnade exception to such a situation.

We hold that absent exigent circumstances, entrance into homes and offices to seize items alleged to violate the Food, Drug, and Cosmetic Act must comply with the basis requirements of the Fourth Amendment: The verified complaint on which the warrant authorizing seizure is based must provide probable cause to believe that the article to be seized violates the act, and the complaint must be scrutinized by a detached, independent official, empowered to decide whether probable cause does exist, before

the warrant is issued.[11] This requirement should not unduly impede the government's routine enforcement efforts.

The judgment of the district court is reversed, and the case is remanded for further proceedings.

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11. Two other circuits have reached the contrary conclusion that civil seizures of this type are not subject to the probable cause standard. In Founding Church of Scientology v. United States, 409 F.2d 1146, 1150 (D.C. Cir.), cert. den., 396 U.S. 963 (1969), the District of Columbia Circuit concluded that in seizure proceedings under the Food, Drug, and Cosmetic Act a showing of probable cause before a magistrate is not required. The Fourth Circuit, quoting from the Scientology opinion, subsequently found a showing of probable cause unnecessary in a seizure under the Federal Hazardous Substances Act (overruling the district court's opinion on this point). United States v. Articles of Hazardous Substance, 588 F.2d 39, 43 (4th Cir. 1978). We do not find the reasoning of these opinions convincing.

APPENDIX B

United States Court of Appeals,
Ninth Circuit

No. 82-4225
D.C. No. 73-3733

United States of America,
Plaintiff-Appellee,

v.

An Article of Device Consisting of One Device, More or Less, Labeled in Part:

(Front)

"Theramatic",
Defendant,

and

Dr. Ralph B. Cloward,
Claimant-Appellant.

Appeal from the United States District Court
for the District of Hawaii
Martin Pence, District Judge, Presiding
Argued and Submitted April 11, 1983

BEFORE: BROWNING, Chief Judge, and WRIGHT and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Cloward, a Honolulu neurosurgeon, seeks the return of a diathermy machine

seized by the government as "misbranded" within the meaning of section 304(a) of the Food, Drug, and Cosmetic Act (the Act), 21 U.S.C. § 334(a). The seizure was conducted pursuant to 21 U.S.C. § 334(b), which directs that the procedures for seizure under the Act "shall conform, as nearly as may be, to the procedure in admiralty," and rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. Supp. Rule C. When this case was before us on a prior appeal, we held that the seizure of the device in Cloward's office violated the fourth amendment and we reversed the district court decision in favor of the government. United States v. Device Labeled "Theramatic", 641 F.2d 1239 (9th Cir. 1981). On remand, the district court granted the government's motion for summary judgment and again ordered

destruction of the device. On this appeal, Cloward contends that the district court lacked jurisdiction, that insufficient untainted evidence existed to support the finding of forfeiture, and that the seizure provisions under rule C violate the due process clause of the fifth amendment. We affirm.

I

On January 6, 1973, the United States Attorney for the District of Hawaii filed a complaint for forfeiture against Cloward's diathermy machine and four accompanying leaflets. The complaint alleged that the machine was misbranded because it was medically ineffective and thus useless in treating the conditions that the leaflets claimed the machine could alleviate. On the same day, pursuant to Rule C, the clerk of the United States

District Court for the District of Hawaii issued a warrant of arrest in rem, directing the United States Marshal to seize the device and leaflets. United States v. Device Labeled "Theramatic", 641 F.2d at 1290-91. On January 16 and 18, 1973, the marshal seized the articles in Cloward's medical office in Honolulu.

On February 16, 1973, Cloward moved to set aside the warrant of arrest and to compel the return of his machine, arguing that his fifth amendment due process rights had been violated. On February 20, 1973, he filed an answer to the complaint for forfeiture. In neither his motion nor the answer did Cloward oppose the government's contention that the machine had been misbranded. Because of prolonged efforts by the parties to reach a consent decree, four years passed before the district court

denied Cloward's motion. The court then entered summary judgment for the government on the forfeiture action, condemning the device because it was misbranded and ordering its destruction once all appeals had been exhausted. Cloward then appealed both the denial of his motion and the judgment in favor of the government. Id. at 1291.

On appeal, Cloward argued for the first time that the seizure of the device and leaflets in his office violated the fourth amendment's prohibition against unreasonable searches and seizures. We concluded that "in the particular factual setting involved here, the procedure used in seizing [Cloward's] diathermy machine and the accompanying leaflets violated the Fourth Amendment." Id. We thus found it unnecessary to consider Cloward's fifth

amendment due process claims, id. n.5, and remanded the case to the district court for further proceedings.

On remand, the district court issued an order to show cause why the seized property should not be returned to Cloward. After receiving memoranda from both parties, the court concluded that our earlier decision did not require that the property be returned to Cloward, because sufficient evidence independent of that tainted by the illegal seizure had been introduced by the government in support of the forfeiture. The district court again ordered the property to be destroyed after exhaustion of all appeals.

II

Cloward argues first that jurisdiction under the Act rests on seizure of the res and, since the res was improperly before

the district court pursuant to a fourth amendment violation, the court lacked jurisdiction to order the device forfeited. We have already rejected this argument. United States v. One 1977 Mercedes Benz, 708 F.2d 444, 450-51 (9th Cir. 1983) (forfeiture proceedings pursuant to 21 U.S.C. § 881). Moreover, an illegal seizure does not immunize the goods from forfeiture. Although "any evidence which is the product of an illegal search or seizure must be excluded at trial, . . . forfeiture may proceed if the Government can satisfy the requirements for forfeiture with untainted evidence." Id. at 450; United States v. An Article of Drug, 661 F.2d 742, 745 (9th Cir. 1981); One (1) 1971 Harley-Davidson Motorcycle, 508 F.2d 351, 351 [sic] (9th Cir. 1974) (per curiam); John Bacall Imports, Ltd. v. United States,

412 F.2d 586, 588 (9th Cir. 1969).

Because Cloward does not contest the misbranding finding, there are no factual issues before the court. We must determine only the legal question whether sufficient independent evidence exists to support a finding of forfeiture.

The government offered two affidavits, each signed by a different Federal Drug Administration (FDA) official in 1977, as independent evidence supporting the misbranding finding. Cloward claims that language in both affidavits indicates that the affiants' conclusions were based on information obtained by testing the illegally obtained device and reading the illegally obtained pamphlets. Hence, he argues, the affidavits do not provide independent, untainted evidence to support the misbranding finding.

We disagree. Although the affidavits refer at times to "the seized device," they indicate that the affiants' conclusions were based (1) on their general knowledge of theramatic devices, not on tests performed on the seized device, and (2) on information gathered by reading copies of the four leaflets. The record discloses that these copies were obtained by FDA agents during a routine inspection of Cloward's office in October 1972, three months before the seizure of the leaflets. Thus, the improper seizure of the leaflets merely provided the FDA with duplicative information. Because the conclusions and the affidavits were not based on the suppressed evidence, they constitute sufficient evidence to sustain a finding of misbranding.

III

Cloward's primary contention is that the forfeiture procedures under rule C violate the due process clause. We specifically left open this question in our previous decision in this case. See United States v. Device Labeled "Theramatic", 641 F.2d at 1291 n.5. We now reject Cloward's due process claims.

Cloward first argues that the procedures violate the due process clause because they do not provide for notice and a hearing prior to the governmental seizure of private property. This argument was rejected by the Supreme Court in Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950). There, the Court held that the government's interest in protecting public consumers from mislabeled products permitted Congress to establish procedures providing for only a postseizure hearing.

Id. at 598-600. Cloward claims that Ewing's validity has been undermined by subsequent due process cases. Rather than undermining Ewing, however, the Supreme Court has repeatedly approved its holding that the government may seize products which violate the Act without providing prior notice or hearing. See Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 301-03 (1981); Parratt v. Taylor, 451 U.S. 527, 538-39 (1981); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-79 (1974); Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 & n.10 (1970).

Cloward contends that even assuming that no preseizure hearing is required, the postseizure hearing under rule C is inadequate because it does not require the government to provide a prompt hearing and

it puts the burden on the defendant to request a hearing. Thus, Cloward claims, the government is free to seize property and do nothing for an indefinite period of time should it choose to do so.

The Supreme Court in Ewing held that the postseizure trial on the merits under the old Admiralty Rules was sufficient to satisfy the hearing requirement of the due process clause: "When the libels are filed the owner has an opportunity to appear as a claimant and to have a full hearing before the court. This hearing, we conclude, satisfies the requirements of due process." 339 U.S. at 598 (footnote omitted). Although Ewing did not involve rule C, we are satisfied that Cloward's claim should be governed by its holding. Accord United States v. Articles of Hazardous Substance, 588 F.2d 39, 43 (4th

Cir. 1978).

Cloward is entitled to a hearing "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Although neither the Act nor the supplemental rules explicitly speak of the timeliness of the postseizure hearing, the mechanics of rule C enable a claimant to obtain a prompt hearing to determine if the seized item has been misbranded. In an action in rem the government is required to file a complaint for forfeiture as a condition precedent to obtaining the arrest warrant. See rule C(2), (3). Thus, a lawsuit is pending in the district court at the time of the seizure. Under rule C(6), the claimant may file an answer to the forfeiture complaint and a claim for his property. By filing any of a variety of motions, including a

motion to quash the warrant, a motion to dismiss the complaint, or a motion for summary judgment, a claimant may obtain an immediate hearing on the misbranding question or the validity of the seizure. Even if these efforts are unsuccessful, he may still obtain a full trial on the merits, including a jury trial if he requests it. 21 U.S.C. § 334(b).

Given the need for swift governmental action to remove misbranded products from the stream of commerce, these procedures provide as much protection to claimants as is feasible. We conclude that rule C provides for a sufficiently prompt hearing to satisfy the due process clause. Accord United States v. Articles of Hazardous Substance, 588 F.2d at 43; United States v. Articles of Drugs . . . WAMS, 536 F. Supp. 703, 705 (D. Puerto Rico 1981).

Nor is rule C unconstitutional as applied to the facts of this case. Cloward filed a motion to set aside the warrant of arrest within one month of the seizure and an answer to the complaint shortly thereafter. Although the misbranding question was not resolved until four years later when the district court decided the government's motion for summary judgment, the four-year delay was due to the settlement neogtiations in which both parties took part. At any time, Cloward was free to eschew the negotiations and obtain a prompt hearing on his claim. A defendant cannot contend that he did not obtain a prompt hearing when he chose not to avail himself of an opportunity to present his claim. See Mitchell v. W. T. Grant Co., 416 U.S. 600, 610 (1974). Likewise, due process is not violated merely because the burden is

put on the defendant to request a hearing. See, e.g., id.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NO. 73-3733

UNITED STATES OF AMERICA,

Plaintiff,

vs.

An article of device . . . "Theramatic", etc.,

Defendant.

MAGISTRATE'S REPORT AND RECOMMENDATION RESPECTING ORDER TO SHOW CAUSE

On August 14, 1981, the Honorable Samuel P. King issued an Order to Show Cause in the above-entitled matter. The order required that counsel appear on September 25, 1981 to show cause why the Theramatic Mark VII machine seized pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, et seq., should not be returned to the claimant, RALPH B. CLOWARD, and why a judgment should not issue awarding

claimant reasonable attorney's fees and expenses.

The matter was assigned to this Court pursuant to 28 U.S.C. § 636(b) and Magistrate Rules 6 and 7 of our district court. The parties presented oral argument on September 25, 1981 and the matter was taken under advisement. Appearing for the government was Forrest Patterson, Esq. and for the claimant was Matthew Yingling, Esq.

STATEMENT OF FACTS

On January 16, 1973, the United States Attorney filed a complaint for the forfeiture of a diathermy-type electronic machine pursuant to the provisions of 21 U.S.C. § 301, et seq.. Under these provisions, instruments for use in the treatment of disease which are mislabeled while in interstate commerce may be condemned and destroyed by the government.

The clerk of court issued a Warrant of Arrest on the day the complaint was filed. Within two days, the United States Marshal seized from claimant's medical office a Theramatic Mark VII machine and four accompanying leaflets.

Claimant moved to set aside the Warrant of Arrest. Before the present motion was heard, a Consent Decree of Condemnation was entered. For reasons irrelevant to the instant matter, the Consent Decree was set aside about two years after its issuance. Claimant's motion to set aside the warrant was then considered and denied. See, Memorandum and Order issued by Judge Dick Yin Wong on March 29, 1977.

The government moved for summary judgment in October, 1977. It was granted by Judge Wong on June 9, 1978 and the machine was ordered destroyed after all appeals

were exhausted. Claimant appealed to the Ninth Circuit.

On appeal, the Ninth Circuit held that the search of claimant's medical office and seizure of his Theramatic Mark VII machine violated the Fourth Amendment due to the constitutional infirmity of the procedure used to obtain the Warrant of Arrest. It reversed the ruling of the district court and remanded the case to the trial court. United States v. Device, Labeled Theramatic, 641 F.2d 1289 (9th Cir. 1981).

DISCUSSION

The judgment of the district court, from which claimant appealed, held that the Theramatic Mark VII machine seized from the claimant was mislabeled under 21 U.S.C. § 301, et seq., and should be forfeited. Claimant argues that reversal of that judgment by the Ninth Circuit can have no effect

but to require the return of the machine. In determining what course to follow on remand, the reasoning of the appellate court opinion, along with its result, must be considered.

The narrow parameters of the discussion in the appellate court opinion suggest that its result is not dispositive on the propriety of returning the machine to claimant. The opinion confined itself to considering the validity of the search of claimant's office and seizure of the machine.

The Ninth Circuit held that a warrant was required prior to the search and seizure. 641 F.2d 1289, 1292. It found the warrant issued by the clerk to be constitutionally deficient in two regards. First, the forfeiture complaint upon which it was issued did not contain adequate

evidence for a determination of probable cause. Second, the clerk who issued the warrant was not empowered to make a finding of probable cause. Id. at 1293. The court went on to find that there were no "exigent circumstances" to obviate the necessity of obtaining a proper warrant. Id. at 1294. It concluded by reversing the district court and remanding the case. It did not, however, make any explicit statements about the effect of the illegal seizure upon the disposition of the machine, nor give the district court any instructions or guidance in that regard.

However, the Ninth Circuit has already stated its views on the effect of an illegal seizure as it relates to the disposition of illegally seized property. See, John Bacall Imports, Ltd. v. United States, 412 F.2d 586 (9th Cir. 1969). In Bacall Imports,

customs agents seized fabrics from claimant's warehouse and the government sought forfeiture under 19 U.S.C. § 1592. The Ninth Circuit upheld the district court's finding that the seizure by the customs agents was illegal, but refused to order the return of the fabrics to the claimant.

The court in Bacall Imports noted that the Supreme Court had prevented forfeiture of an automobile due to an illegal search and seizure in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). It interpreted Plymouth Sedan to hold only that illegally obtained evidence cannot be used to support a forfeiture. 412 F.2d 586, 588. It distinguished Plymouth Sedan from the case before it on the basis that the evidence supporting forfeiture of the fabrics was not illegally obtained.

In United States v. One 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (9th Cir. 1974), the Ninth Circuit followed its holding in Bacall Imports. In Harley-Davidson, the government had brought a forfeiture action against a motorcycle pursuant to 49 U.S.C. § 782, a statute which authorizes forfeiture of vehicles used in any of a variety of connections with contraband. The district court had denied the forfeiture of the motorcycle due to the illegality of its seizure. The Ninth Circuit reversed the district court, citing Bacall Imports with approval and distinguishing Plymouth Sedan:

> "We believe the district court was in error when it denied the forfeiture action of the United States, brought pursuant to 49 U.S.C. § 782, on the basis that the warrantless seizure of the motorcycle was unreasonable. While we do not condone illegal searches and while the district court's findings is supported by the evidence, that does not answer

> the question before us. The mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture. John Bacall Imports, Ltd. v. United States, (citation omitted).
>
> Appellee argues that One 1958 Plymouth Sedan v. Pennsylvania, (citation omitted), stands for the proposition that an object illegally seized cannot in any way be used, either as evidence or as the basis for in rem jurisdiction. Plymouth Sedan, however, held only that evidence derived from a search in violation of the Fourth Amendment must be excluded at a forfeiture proceeding. This was a natural extension of the exclusionary rule enunciated in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In the case before us all the evidence introduced in the forfeiture proceeding was derived independently of the motorcycle's seizure." 508 F.2d 351.

Evidence supporting the forfeiture of the machine in this action has to have been illegally obtained in order for the rule of Plymouth Sedan to apply. Use of the machine as evidence that it is a "device" within the meaning of 21 U.S.C. § 321(h) cannot be objected to any more than could use of the motorcycle in Harley-Davidson

or the fabrics in Bacall Imports to show they were items subject to forfeiture under the applicable statutes. A tenable argument is possible, however, to characterize the leaflets, illegally seized from claimant's office, as evidence subject to exclusion under Plymouth Sedan.

It is unnecessary to determine whether the illegally seized leaflets are excludable evidence under the rule of Plymouth Sedan, as adopted by the Ninth Circuit, since the leaflets were not used as evidence in support of the forfeiture of the machine. Claimant admitted to possession of the leaflets in paragraph two of his answer to the complaint. Evidence that the contents of the leaflets, admittedly possessed by claimant, made the machine "mislabeled" under 21 U.S.C. § 352 does not appear to have come from an examination or

introduction into evidence of the illegally seized leaflets. The evidence of mislabeling came from a physicist with the Food and Drug Administration, Robert J. Kennedy, and an M.D. with the FDA, Joseph B. Davis. Both affiants attributed their knowledge concerning the machine and its accompanying leaflets to their familiarity with that model and its literature acquired during the course of their official duties. There was no indication that this particular Theramatic machine and its leaflets were ever examined by the affiants. Plaintiff's Motion for Summary Judgment, October 18, 1977, Exhibits E and F.

Claimant prays that the mere fact of reversal of the district court by the Ninth Circuit in this case be viewed as requiring return of the machine. Claimant's request could be granted only by viewing the Ninth

Circuit opinion in this case as overruling, implicitly and in the most indirect manner, its prior holdings in Bacall Imports and Harley-Davidson Motorcycle. Formality may dictate adherence to this view. Justice does not.

Claimant argues that the facts of Bacall Imports and Harley-Davidson Motorcycle are distinguishable from those of the instant action. Claimant contends that the prior cases were not of an entirely civil nature and the seizures in those actions preceded the filing of the forfeiture complaints and were not made solely for the purpose of later forfeiture. Assuming this to be so, these are distinctions without a difference.

In focusing on the civil nature of this forfeiture action under the Federal Food, Drug, and Cosmetic Act, claimant draws

a sword that cuts against him more than his opponent. In Plymouth Sedan, the reasoning of the Supreme Court suggests that the propriety of applying the exclusionary rule in forfeiture proceedings is, in part, attributable to the court's view that the forfeiture of an automobile, because of its use in illegal activities, is "quasi-criminal in character". 380 U.S. 693, 696-700.

Claimant attempts to use the civil nature of this proceeding to suggest that the public policy behind preventing possession of "devices" that are "mislabeled" under the Food, Drug, and Cosmetic Act is less compelling than where possession is a criminal offense in itself, i.e., possession of heroin. A consideration of claimant's inference concerning the public policy behind the statutes authorizing condemnation of devices such as the Theramatic

Mark VII machine might be necessary were the decision not to return the machine based on a distinction between contraband per se, such as heroin, and derivative contraband, such as the automobile in Plymouth Sedan and the motorcycle in Harley-Davidson. Because the decision not to return the machine is based on a finding that none of the evidence used in the forfeiture proceeding was illegally obtained, the civil nature of that proceeding is irrelevant.

Claimant's contention that the seizures in Bacall Imports and Harley-Davidson Motorcycle preceded the initiation of forfeiture proceedings in those cases is also of no consequence. If an illegal seizure by the government after and pursuant to a forfeiture complaint were to present successful forfeiture of the illegally seized item, as claimant argues, no less

would be true where a prior illegal seizure by the government put the item within the government's control. The taint of the government's prior illegal seizure would, surely, carry to the forfeiture action. The holding in Bacall Imports that the illegality of the prior customs seizure did not prevent forfeiture of the fabrics in a subsequent proceeding remains controlling in this action.

The Ninth Circuit has declared that claimant's Fourth Amendment rights were violated. Because return of the illegally seized items is denied does not mean claimant was without remedy. A possible recourse for claimant in recovering any actual damages was an action against the federal officials responsible for the violation of his rights. See, Bivens v. Six Unknown

Federal Narcotics Agents, 403 U.S. 388 (1971).

Claimant's request for attorney's fees and expenses must also be denied. Because the issue framed by the claimant on appeal was not relevant to the actual dispute over the disposition of the illegally seized machine, claimant is a "prevailing party" in name only. In any case, the government's position below and on appeal was substantially justified.

The outcome of this Court's decision may appear to claimant to have made its success on appeal for naught. In oral argument on September 25, 1981, claimant indicated a readiness to take any adverse decision by this Court or the district court up to the Ninth Circuit on appeal. If by its decision of March 30, 1981, the Ninth Circuit intended to overrule or distinguish

its prior holdings in Bacall Imports or Harley-Davidson Motorcycle, claimant's appeal of this decision on remand will give the Ninth Circuit an opportunity to so hold.

RECOMMENDATION

It is this Court's opinion that good cause has been shown by the government why the district court should not order the return of the Theramatic Mark VII machine and why it should deny claimant's request for an award of attorneys' fees and expenses. It is therefore recommended that the district court order the United States Marshal to destroy the machine after all appeals have been exhausted.

DATED: October 16, 1981 at Honolulu, Hawaii.

THOMAS P. YOUNG
UNITED STATES MAGISTRATE

ORDER

After having carefully reviewed the record, the pleadings, and the memoranda of the parties in this case, I approve the Magistrate's Report and Recommendation.

The Clerk of Court will immediately serve a copy of this Report and Recommendation and Order by mail upon counsel for the parties.

If no objection is made within ten (10) days of receipt of this Order, the Magistrate's Report and Recommendation will be adopted as the opinion and Order of this Court.

IT IS SO ORDERED.

DATED: October 16, 1981 at Honolulu, Hawaii.

MARTIN PENCE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NO. 73-3733

UNITED STATES OF AMERICA,

Plaintiff,

vs.

An article of device . . . "Theramatic", etc.,

Defendant.

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

Having considered the Report and Recommendation of the Magistrate, the claimant's objections, and the government's response, this court adopts the Report and Recommendation of the Magistrate as its decision and order with the following additional remarks:

Any doubt this court may have had as to the continuing vitality of Bacall Imports and Harley-Davidson Motorcycle has been

alleviated by the Ninth Circuit's recent decision in United States v. An Article of Drug, 661 F.2d 742 (9th Cir. 1981). In that case, the court, citing Bacall Imports and Harley-Davidson Motorcycle, held that a claimant may not object to a forfeiture where the requirements of forfeiture have been proven by evidence not tainted by an illegal seizure. This court finds An Article of Drug indistinguishable from this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 11, 1982.

MARTIN PENCE
UNITED STATES DISTRICT JUDGE

APPENDIX E

§ 334. Seizure

(a) Grounds and jurisdiction.

(1) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 404 or 505 [21 USCS § 344 or 355], be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States or United States court of a Territory within the jurisdiction of which the article is

found: Provided, however, That no libel for condemnation shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (A) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (B) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department

that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district

reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(2) The following shall be liable to be proceeded against at any time on libel of information and condemned in any district court of the United States or United States court of a Territory within the jurisdiction of which they are found: (A) Any drug that is a counterfeit drug, (B) Any container of a counterfeit drug, and (C) Any punch, die, plate, stone, labeling, container, or other thing used or designed for use in making a counterfeit drug or drugs.

(b) Procedure--Multiplicity of pending proceedings.

The article, equipment, or other thing proceeded against shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be

consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of

consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

Note: After the seizure in this case Section 334 of Title 15 was amended by Act of April 22, 1976, P.L.94-278, Title V, § 502(a)(2)(C), 90 Stat. 411, and by Act of May 28, 1976, P.L. 94-295, §§ 3(c), 7(a), 90 Stat. 576, 582.

APPENDIX F

Rule C. Actions In Rem: Special Provisions.

(1) WHEN AVAILABLE. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an

instrumentality thereof may proceed on in rem principles.

(2) COMPLAINT. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) PROCESS. Upon the filing of the complaint the clerk shall forthwith issue a warrant for the arrest

of the vessel or other property that is the subject of the action and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment.

(4) NOTICE. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the

court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) ANCILLARY PROCESS. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property

in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) CLAIM AND ANSWER; INTERROGATORIES. The claimant of property that is the subject of an action in rem shall file his claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve his answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirma-

tion, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that he is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

No. 83-965

In the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH B. CLOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—Continued:

In the Supreme Court of the United States

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No. 83-965

RALPH B. CLOWARD, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 13-17) that the district court did not possess in rem jurisdiction over a misbranded medical device seized from his offices, and accordingly could not condemn the device pursuant to the provisions of the Federal Food, Drug, and Cosmetic (FDC) Act, 21 U.S.C. 301 *et seq.*. Petitioner also contends (Pet. 17-29) that his due process rights were violated by the procedures used in seizing the device.

1.a. Section 304 of the FDC Act, 21 U.S.C. 334, authorizes the seizure and condemnation of misbranded medical devices, and provides that a misbranded device shall be proceeded against by a libel, following procedures that "conform, as nearly as may be, to the procedure in admiralty" (21 U.S.C. 334(b)).

A diathermy machine[1] and accompanying literature were seized from the offices of petitioner, a Honolulu neurosurgeon, pursuant to Section 304. The seizure was made after a routine inspection by Food and Drug Administration (FDA) officers revealed the misbranded diathermy device. The United States Attorney filed a verified complaint for forfeiture on behalf of FDA in district court, in compliance with Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, and the clerk of the court, pursuant to Supplemental Rule C(3), issued a warrant for the arrest of the device. The warrant was executed by a United States marshal, who seized the device and its accompanying literature. Pet. App. A 2a, 4a-6a.

A month later, petitioner filed a motion to set aside the warrant of arrest and to declare that issuance of the warrant violated the Fifth Amendment. This motion was denied, and the United States' motion for summary judgment on the misbranding issue was granted. Pet. App. A 6a-7a.[2]

b. On appeal, the court of appeals held that the seizure procedure violated the Fourth Amendment. 641 F.2d 1289; Pet. App. A 1a-25a. The court concluded that the Fourth Amendment required that the warrant of arrest be issued by a neutral magistrate, after an independent determination of probable cause, not simply by a clerk. Pet. App. A 13a-14a.

c. On remand, the district court issued an order to show cause why the seized property should not be returned to petitioner "forthwith." The court ultimately concluded that

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[1]A diathermy machine produces localized heating of subcutaneous body tissues by means of high-frequency electrical oscillations. The government seized petitioner's machine on the ground that it failed to heat the tissue sufficiently to be medically useful and was not effective therapy for the conditions mentioned in the accompanying literature. Pet. App. A 5a n.3.

[2]Petitioner has not contested that the device was misbranded. Pet. App. B 4a.

return of the seized property was not required, because sufficient evidence independent of that tainted by the illegal seizure had been adduced to support forfeiture. It ordered the property destroyed "after all appeals have been exhausted." Pet. App. D, incorporating Pet. App. C 17a.

d. Petitioner appealed a second time. In the decision that is the subject of this petition, the court of appeals affirmed the district court's disposition on remand. 715 F.2d 1339; Pet. App. B 1a-16a. It held that, under established Ninth Circuit precedent, the district court retained in rem jurisdiction even in the face of a Fourth Amendment violation, and that forfeiture can proceed if the government can show, using untainted evidence, that forfeiture is justified (Pet. App. B 7a). The court determined that such independent evidence exists here (*id.* at 8a-9a).

The court of appeals also rejected petitioner's due process argument. It concluded that this Court's decision in *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), established that the public interest in protecting consumers from misbranded products justified Congress' decision to provide in Section 304 for only a post-seizure hearing. Further, the court held, the procedures followed here were adequate; a lawsuit was pending (resulting from filing of the complaint for forfeiture) at the time that seizure was initiated, and the owner was free to obtain a prompt hearing on his claims at any time after seizure. Pet. App. B 10a-16a.

2. The decision below is correct and does not conflict with the opinions of this Court or any court of appeals. Further review by this Court is unwarranted.

a. Petitioner argues first that the district court could not properly obtain in rem jurisdiction over the diathermy device because the device was improperly seized. It has long been established that defects in the manner in which custody of the res is obtained do not defeat the in rem jurisdiction of a court that has such custody. *E.g., Dodge* v. *United*

States, 272 U.S. 530, 532 (1926); *Taylor* v. *United States*, 44 U.S. (3 How.) 197, 205-206 (1845); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 358-359 (1842); see also *United States* v. *One 1977 Mercedes Benz*, 708 F.2d 444, 450-451 (9th Cir. 1983). This principle has been applied where the defect related to the authority of the person seizing the res (see, *e.g.*, *Taylor* v. *United States*, *supra*) as well as where the defect was related to constitutional deficiencies in the entry or seizure (see, *e.g.*, *United States* v. *Eighty-Eight Thousand, Five Hundred Dollars*, 671 F.2d 293, 296-298 (8th Cir. 1982); *United States* v. *One 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir. 1974); *United States* v. *Eight Boxes Containing Various Articles of Miscellaneous Merchandise*, 105 F.2d 896, 898-900 (2d Cir. 1939)).[3] The rationale for the rule was explained by Justice Holmes in *Dodge*, 272 U.S. at 532:

> However effected, [the seizure] brings the object within the power of the Court, which is an end that the law seeks to attain, and justice to the owner is as safe in the one case [where seizure was not authorized] as in the other [where seizure was authorized]. The jurisdiction of the Court was secured by the fact that the *res* was in the possession of the [proper government official] when the libel was filed.

The court of appeals' decision, therefore, was squarely based on governing precedent.

Petitioner argues, however (Pet. 13-17), that as a matter of policy the district court should have refused jurisdiction, in order to deter future illegal seizures by FDA officials. He

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[3]This principle corresponds to the rule that a federal court may exercise in personam jurisdiction in criminal cases, regardless of whether the defendant was brought before it by illegal arrest or other defective procedures. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463, 474 (1980); *Ker* v. *Illinois*, 119 U.S. 436, 444 (1886).

asserts that the mere exclusion of evidence obtained by the seizure was not a genuine sanction, because here the seizure was not used to gather evidence of a crime, but only to remove a misbranded article from use. Petitioner cites no authority to support his position, nor is it supportable. The exclusion of the improperly seized evidence in this case actually did impose a sanction, because the FDA was forced to show that the diathermy device was misbranded using evidence obtained by means other than the seizure. This sanction, which could have resulted in dismissal of the case if independent evidence of misbranding had not existed, is comparable to the exclusionary rule sanction in criminal prosecutions. Moreover, petitioner's proposed additional sanction — the return of the seized property — would be pointless: the returned property could immediately be seized under a new warrant, on the basis of the independent evidence of misbranding that admittedly existed in this case.[4]

In short, no public policy supports petitioner's suggestion that the district court should have required return of the seized property in this case.

b. Petitioner also argues (Pet. 17-29) that the Fifth Amendment requires prior notice and hearing before seizure of a misbranded or adulterated article under Section 304. This issue, however, was settled decades ago by this Court in *Ewing* v. *Mytinger & Casselberry, Inc., supra*, and this Court has repeatedly reaffirmed the correctness of that decision.[5] The Court concluded that Congress could reasonably decide that consumer protection requires the timely

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[4]This would be merely a nuisance, not a deterrent, and could lead to actual harm to the public if the owners of an admittedly misbranded device managed to secrete it in the interval between return and renewed seizure.

[5]See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 302 (1981); *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 612 (1974); *Fuentes* v.

seizure of misbranded articles prior to a hearing, and stated (339 U.S. at 599-600):

> One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control. * * * The decision of Congress was that the administrative determination to make multiple seizures should be made without a hearing. We cannot say that due process requires one at that stage.

Petitioner insists that *Ewing* addressed only the necessity for a hearing prior to the time the FDA referred the matter to the Attorney General for execution of the seizures, and that *Ewing* left open whether a hearing is required between the time the matter is referred to the Attorney General and the seizures are actually made. This argument is groundless. The *Ewing* Court viewed Section 304 seizures as merely an extension of the well-established power to destroy property without notice or hearing for reasons of public health. The Court reasoned simply that a judicial hearing after "the libels are filed," "satisfies the requirements of due process" (339 U.S. at 598). And subsequent decisions of this Court have interpreted *Ewing* as upholding actual seizures under Section 304 prior to a hearing, not simply referrals to the Attorney General. See, *e.g.*, *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-679 (1974); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 612 (1974).[6]

Shevin, 407 U.S. 67, 92 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 263 n.10 (1970).

[6]Petitioner also contends that *Ewing* was undermined by *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, *supra*. But *Fuentes* expressly distinguished and reaffirmed *Ewing* (407

The court of appeals thus correctly determined that *Ewing* forecloses petitioner's argument.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

U.S. at 92) and *Sniadach* involved wage garnishment by a private individual, where no public health interest weighed in favor of immediate seizure. See *Fuentes*, 407 U.S. at 91.

[7]The district court opinions cited by petitioner (Pet. 23) as ostensibly questioning the constitutionality of Rule C of the Supplemental Admiralty Rules, have either been reversed or do not involve the FDC Act.